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NO. 91-742

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1991

PORTER E. KRISHER,
Petitioner

v.

RONALD SHARPE, ROBERT G. WERTS,
BROOK YOUNG and RICHARD MOONEY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Pennsylvania State Police regulation that prohibits its members from running for office during their employment is overbroad or violates an officer's First Amendment rights of free speech and association?

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STATEMENT OF THE CASE

Petitioner, Porter E. Krisher, is a Pennsylvania State Police ("PSP") trooper. (Petition, pp. 40-41.)[1] He seeks review of the Court of Appeals' affirmance of the District Court's dismissal of his civil rights action, which challenged the constitutional validity of a PSP regulation that prohibits its members from running for political office during their employment.

1. PSP Field Regulation 1-1, Section 1.12, Politics, an internal PSP regulation, prohibits PSP members from participating in various political

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[1]"Petition" refers to the Petition for a Writ of Certiorari which includes the petition and an appendix.

activities, including running for or holding any political office. (Petition, pp. 41-42.) Krisher ran unsuccessfully for political office while a member of the PSP. (Petition, pp. 42-43.) He was subsequently court-martialed. (Petition, p. 45.)

2. Petitioner filed his action in the United States District Court for the Eastern District of Pennsylvania pursuant to 42 U.S.C. §1983 against four high-ranking members of the PSP. (Petition, pp. 39-40.) Petitioner challenged the regulation as overbroad, violating his rights of free speech and association under the First Amendment, and being an improper legislative action. (Petition, pp. 47-49.)

3. As the parties stipulated and the District Court found, the PSP

prohibits its members from running for or holding political office during their employment for several reasons. First, members of the PSP have a duty to impartially enforce and execute the laws of the Commonwealth of Pennsylvania. (Petition, pp. 49-50.) The regulation at issue prevents PSP officers from using their broad discretionary powers as law enforcement officers to garner favors from potential constituents and other interested parties or from meting out unfair punishment to political opponents and their supporters. (Petition, p. 50.) If members of the PSP are publicly aligned with political parties, the public will perceive the PSP itself as "backing" those persons and those parties as opposed to being a neutral

law enforcement agency. (Petition, pp. 50-51.) Likewise, the PSP also fears that its members would face conflicts of interest between their duties to uphold the laws of the Commonwealth of Pennsylvania and to abide by the internal rules and regulations of the PSP and their allegiances to their parties. (Petition, pp. 52-54.)

Other interests underlying the regulation include promoting integrity in discharging police duties by avoiding situations where members of the PSP could utilize their positions to attempt to or actually influence members of the public to support them in their political campaigns. (Petition, pp. 54-55.) Additionally, the PSP seeks to attract qualified persons by guaranteeing job security. The PSP

wants to avoid its ranks becoming too laden with political officeholders such that political affiliation would be considered in matters of retention and promotion. (Petition, pp. 55-56.) Moreover, members of the PSP have access to confidential Criminal History Record Information. A member of the PSP who runs for political office could use such confidential information, to the extent that it exists, against an opponent or a member of the opponent's family during an election. (Petition, p. 56.) Finally, the PSP wants to avoid any perception that how members of the public act politically will effect their relationship with the PSP. (Petition, p. 56.)

4. On cross-motions for summary judgment, the District Court rejected

each of petitioner's legal challenges. (Petition, pp. 37-70.) Relying heavily on United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973), and Broadrick v. Oklahoma, 413 U.S. 601 (1973), the District Court found that the regulation does not unconstitutionally infringe on petitioner's First Amendment rights. (Petition, pp. 56-65.) The Court also found that the regulation is not substantially overbroad nor is it infirm because it was not legislatively enacted. (Petition, pp. 65-68.) The Court of Appeals summarily affirmed. (Petition, p. 33.)

SUMMARY OF ARGUMENT

On certiorari, the Court does not sit simply to reconsider legal rulings by lower courts. Even if it did, the lower courts here did not err. The regulation does not infringe on petitioner's First Amendment rights because the PSP's legitimate and substantial interest in maintaining the integrity of its police force outweighs petitioner's rights. The regulation is not overbroad in light of the PSP's interests and because the regulation's proscription against running for office is tailored as narrowly as possible to achieve its intended result. Furthermore, there is no federal requirement that limitations in political activities for public

employment must be statutorily enacted. Finally, there is no conflict between this case and any other Third Circuit Court of Appeals decision nor is there any conflict among the Courts of Appeals on whether limitations in political activities for public employees can be enacted only by a legislature.

REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT PRESENT ANY SPECIAL OR IMPORTANT ISSUE TO JUSTIFY REVIEW BY THE COURT

1. In seeking certiorari, petitioner simply argues that the District Court and Court of Appeals decided his case wrongly. Petitioner argues that the courts "struck the wrong balance" in deciding that the regulation does not unconstitutionally infringe on his First Amendment rights and that the regulation is not overbroad. (Petition, pp. 24 and 30.) He also argues that limitations in political activities for public employment must be statutorily enacted and that the regulation is unenforceable because the terms of his employment are governed solely by a collective bargaining agreement which does not restrict his political activity.

On certiorari, however, the Court reviews cases of significance; it does not sit simply to reconsider legal rulings by lower courts, even arguably erroneous ones.

2. Petitioner contends that the regulation's prohibition against PSP members running for political office violates his First Amendment rights of free speech and association. According to Letter Carriers, 413 U.S. 548, and Broadrick, 413 U.S. 601, however, a state can impose constitutionally permissible limitations on the partisan political activities of its employees provided that a balance is struck between the rights of the employees and the interests of the state which are at stake. The disputed regulation limits a

PSP member's First Amendment right to run for political office. However, this limitation is permissible in light of the state's legitimate and substantial interest in preventing potential abuse by members in carrying out their duty to enforce the law in an even-handed and neutral manner and in safeguarding the appearance of propriety. The PSP's interests outweigh the petitioner's First Amendment rights. Therefore, the regulation does not infringe on petitioner's rights.

Petitioner also claims that the regulation's reach is overbroad. "[W]here conduct and not merely speech is involved," the overbreadth of a statute, according to Broadrick, "must not only be real but substantial as well, judged in relation to the

statute's plainly legitimate sweep." Id. at 615. As previously discussed, the regulation serves a legitimate and substantial interest of the state. The regulation's proscription against running for political office is tailored as narrowly as possible to achieve its intended result. A less restrictive alternative simply cannot exist without effectively undermining the state's legitimate concerns for even-handed law enforcement and the appearance of propriety. The regulation explicitly preserves the right of employees to participate substantially in political activities. Hence, this regulation is not substantially overbroad.

Petitioner contends too that limitations in political activities for public employees can be enacted only by

a legislature -- they cannot be created by regulation. However, the cases which he cites for that proposition, Letter Carriers, 413 U.S. 548, Broadrick, 413 U.S. 601, Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3d Cir. 1974), and Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir. 1977), do not say that at all. Respondents' counsel knows of no authority that supports that proposition and, as the District Court found, regulations of this nature have routinely been upheld without need of legislative enactment. See Aiello v. City of Wilmington, Delaware, 623 F.2d 845 (3d Cir. 1980)(Rules and Regulations of the Bureau of Fire of the City of Wilmington, Delaware); Gasparinetti v. Kerr, 568 F.2d 311 (3d Cir. 1977)(Newark Police Department Rules and

Regulations); Giglio v. Supreme Court of Pennsylvania, 675 F. Supp. 266 (M.D. Pa. 1987)(memoranda of the Pennsylvania Supreme Court); Nicodem v. Commonwealth of Pennsylvania, Pennsylvania State Police, 64 Pa. Commonwealth Ct. 323, 439 A.2d 1325 (1982)(Pennsylvania State Police Field Regulation 1-1, Section 1.12).

Petitioner also argues that the respondents may not enforce Field Regulation 1-1, Section 1.12 against him because the terms of his employment are governed solely by a collective bargaining agreement, which does not restrict his political activity. This issue, however, was not raised in petitioner's complaint nor in his motion for a preliminary and permanent injunction; nor are there facts of record relative to a collective

bargaining agreement. Thus, this issue is not properly before the Court and respondents will not address the merits of this issue.

3. Petitioner also claims that the Court should exercise its discretionary review because the Court of Appeals for the Third Circuit "has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter." (Petition, p. 21.) The only "conflict" petitioner refers to, though, is with another case from the Third Circuit Court of Appeals, Alderman, 496 F.2d 164, which supposedly stands for the proposition that limitations in political activities for public employees can be enacted only by a legislature. There is, however, no conflict between the two Third Circuit

Court of Appeals decisions in Alderman and this case.[2] Nor are respondents aware of any conflict among the Courts of Appeals on this issue.

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[2]In Alderman, the Third Circuit made clear that it was not deciding "whether [Letter Carriers, 413 U.S. 548, and Broadrick, 413 U.S. 601,] can have any application in the context of a more-or-less ad hoc administrative measure" such as an internal memorandum. Alderman, 496 F.2d at 171. Thus, Alderman does not preclude the application of Letter Carriers' and Broadrick's analysis to the internal PSP regulation at issue in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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